

These are the tentative rulings for civil law and motion matters set for Tuesday, November 4, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday November 3, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0059221 Midland Funding LLC vs. Orsi, Edward

Plaintiff's Motion to Vacate Dismissal and Enter Judgment is granted. Pursuant to Code of Civil Procedure section 664.6, the dismissal of this action is set aside, and judgment is entered against defendant Edward Orsi in the principal amount of \$6,547.58, plus interest in the amount of \$1,716.25 and costs in the amount of \$293.00.

2. M-CV-0062325 Cova, Wanda vs. O'Harra, Melissa Ann

Appearance required on November 4, 2014 at 8:30 a.m. in Department 40.

3. S-CV-0030179 Cornell, Darold, et al vs. Morrison Homes, Inc.

Cross-defendant F. Rodgers Insulation, Inc.'s Motion for Good Faith Settlement is continued to November 18, 2014 at 8:30 a.m. in Department 40.

The proof of service filed with the motion is deficient as it fails to identify the parties served. Accordingly, the court is unable to determine whether all necessary parties were served with the subject motion. Moving party shall file an amended proof of service at least five court days prior to the continued hearing date.

If oral argument is requested, moving party's request for telephonic appearance is granted. All telephonic appearances are governed by Local Rule 20.8.

4. S-CV-0030195 Bellomy, John H. vs. Hunt, Terrie L.

The Motion for Summary Judgment is continued to November 6, 2014 at 8:30 a.m. in Department 40.

5. S-CV-0030565 Lee, Richard, et al vs. Paul Hills Construction, Inc.

Defendant Paul Hills Construction, Inc.'s Motion for Reconsideration is granted. The court finds good cause to reconsider its ruling on plaintiffs' prior Motion to Quash, based on facts and circumstances not previously known to the court.

Having reconsidered plaintiffs' Motion to Quash, including consideration of defendant's opposition, attached as Exhibit 5 to the declaration of Keith White, the court affirms its original order granting the motion.

The subpoenas at issue seek financial records and other documents relating to plaintiff's business, Lee Institute of Plastic Surgery, and MOB 5, an organization formed to develop the medical building in which plaintiff's business is located. The requested documents relate to an unrelated construction project that is not at issue in this lawsuit. The subpoenas appear to have no relevance to the instant action, which arises from construction defect claims relating to the construction of plaintiffs' residence. Defendant argues that the requested discovery may show that plaintiffs were experiencing financial troubles during the time that the subject home was being constructed, and therefore is relevant to plaintiffs' alleged failure to provide or hire competent construction oversight, to hire licensed contractors, and to pay for adequate construction materials. Defendant also argues that the requested discovery may show that plaintiffs had familiarity with change orders, because change orders were likely involved in the office project.

A right to privacy exists as to a party's confidential financial affairs, even if the information is relevant to the litigation. *Cobb v. Superior Court* (1979) 99 Cal.App.3d 543, 550. The confidential financial affairs of third persons are also entitled to privacy. *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658. In cases where such information is sought, the need for the discovery must be weighed against the interest sought to be protected. In this case, defendant fails to establish that the discovery sought is probative to any material issues in this action. Accordingly, the motion to quash is granted.

6. S-CV-0031959 Spann, William vs. CBM-96, LLC, et al.

Motions for Protective Order and Motion to Compel

Appearance required on November 4, 2014 at 8:30 a.m. in Department 40 regarding appointment of a discovery referee.

Casper's Demurrer to Second Amended Cross-Complaint of Edward Mackay

John P. Casper, individually and as trustee of the John P. Casper, the John P. Casper Family Partnership, and CBM Group, Inc.'s ("Casper's") Demurrer to Second Amended Cross-Complaint of Edward Mackay ("Mackay") is sustained with leave to amend.

Mackay's first, second and sixth causes of action are alleged as derivative claims on behalf of CBM-96 LLC ("CBM"). The first cause of action alleges breach of fiduciary duty against CBM, Casper, individually and as trustee of the John P. Casper Trust ("the Trust"), and the John P. Casper Family Partnership. The second cause of action alleges breach of fiduciary duty against CBM, Casper, individually, and The CBM Group, Inc. The sixth cause of action alleges breach of fiduciary duty against Casper, individually, and as trustee of the Trust. Casper argues, and Mackay concedes, that there is no factual basis to establish a fiduciary relationship between the Trust, the John P. Casper Family Partnership, or The CBM Group, Inc., on one hand, and CBM or Mackay on the other hand. However, Mackay argues that the John P. Casper Family Partnership and the CBM Group, Inc. are properly named as defendants with respect to these claims because they are in alter ego relationships with Casper. In support of this argument, Mackay cites to case law holding that an individual may be liable for the actions of a corporation under the alter ego doctrine, but does not cite authority for the opposite situation, where a plaintiff seeks to hold a corporation or partnership liable for the actions of an individual member or partner. *See Postal Instant Press v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510 (rejecting "reverse piercing" of corporate veil). In any event, Mackay concedes that a fiduciary relationship is not established as to moving defendants, and fails to establish that valid claims for breach of fiduciary duty are stated.

With respect to allegations against Casper as trustee of the Trust, Mackay claims that a cause of action for breach of fiduciary duty may be stated because the second amended cross-complaint alleges that Casper acquired assets of the Company in the name of the Trust, and Mackay should be able to satisfy any damages award from Trust assets. Whether Mackay may be able to reach Trust assets to satisfy a judgment is a separate issue from whether a claim *for breach of fiduciary duty* is stated against Casper, as trustee for the Trust. In this case, the second amended cross-complaint does not adequately allege that Casper, as the trustee of the Trust, owed a fiduciary duty to the Company or Mackay.

Alternatively, Mackay argues that he can allege claims for aiding and abetting breach of fiduciary duty against Casper, as trustee of the Trust, the John P. Casper Family Partnership, and the CBM Group, Inc. Consequently, leave to amend is granted for this limited purpose. Any amended cross-complaint shall be filed and served by no later than November 21, 2014.

Casper's Demurrer to Second Amended Cross-Complaint of Ronald Bettencourt

Casper's Demurrer to Second Amended Cross-Complaint of Ronald Bettencourt ("Bettencourt") is sustained with leave to amend.

Bettencourt's first and second causes of action are alleged as derivative claims on behalf of CBM-96 LLC ("CBM"). The first cause of action alleges breach of fiduciary duty against

CBM, Casper, individually and as trustee of the Trust, and the John P. Casper Family Partnership. The second cause of action alleges breach of fiduciary duty against CBM, Casper, individually, and The CBM Group, Inc. Casper argues, and Bettencourt concedes, that there is no factual basis to establish a fiduciary relationship between the Trust, the John P. Casper Family Partnership, or The CBM Group, Inc., on one hand, and CBM or Bettencourt on the other hand. However, Bettencourt argues that the John P. Casper Family Partnership and the CBM Group, Inc. are properly named as defendants with respect to these claims because they are in alter ego relationships with Casper. In support of this argument, Bettencourt cites to case law holding that an individual may be liable for the actions of a corporation under the alter ego doctrine, but does not cite authority for the opposite situation, where a plaintiff seeks to hold a corporation or partnership liable for the actions of an individual member or partner. *See Postal Instant Press v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510 (rejecting “reverse piercing” of corporate veil). In any event, Bettencourt concedes that a fiduciary relationship is not established as to moving defendants, and fails to establish that valid claims for breach of fiduciary duty are stated.

With respect to allegations against Casper as trustee of the Trust, Bettencourt claims that a cause of action for breach of fiduciary duty may be stated because the second amended cross-complaint alleges that Casper acquired assets of the Company in the name of the Trust, and Bettencourt should be able to satisfy any damages award from Trust assets. Whether Bettencourt may be able to reach Trust assets to satisfy a judgment is a separate issue from whether a claim *for breach of fiduciary duty* is stated against Casper, as trustee for the Trust. In this case, the second amended cross-complaint does not adequately allege that Casper, as the trustee of the Trust, owed a fiduciary duty to the Company or Bettencourt.

Alternatively, Bettencourt argues that he can allege claims for aiding and abetting breach of fiduciary duty against Casper, as trustee of the Trust, the John P. Casper Family Partnership, and the CBM Group, Inc. Consequently, leave to amend is granted for this limited purpose. Any amended cross-complaint shall be filed and served by no later than November 21, 2014.

Motion to Consolidate

Defendants Edward Mackay and Ronald Bettencourt’s Motion to Consolidate Actions is granted.

Code of Civil Procedure section 1048 allows the court to order actions consolidated where they involve common questions of law or fact. Moving parties establish that the two actions to be consolidated involve overlapping issues, parties, facts and witnesses, and in part arise from the same events and seek the same relief. In order to avoid unnecessary cost and duplication of evidence or the possibility of inconsistent rulings, consolidation is appropriate.

Casper, et al. v. Mackay, et al., Case No. SCV-33414 is hereby consolidated with *Spann v. CMB-96, LLC, et al.*, Case No. SCV-31959, for all purposes. Case No. SCV-31959 shall be the lead case. The trial, mandatory settlement conference, and civil trial conferences dates currently set in Case No. SCV-33414 are hereby vacated.

7. S-CV-0032599 Chung, Arnold, et al vs. Leipsic, Reginald

Motion for Order Deeming Matters Admitted

Plaintiffs' Motion for Order Deeming Matters Admitted is granted. Plaintiffs' Request for Admissions, Set One, are deemed admitted.

Motion to Compel Responses and for Sanctions

Plaintiffs' Motion to Compel Responses and for Sanctions is granted in part. Defendant shall serve verified responses, without objections, to plaintiffs' Form Interrogatories – General, Set One, Request for Production of Documents, Set One, and Special Interrogatories, Set One, by no later than November 21, 2014. The motion is denied with respect to plaintiffs' Request for Admissions, Set One, in light of the ruling on plaintiffs' Motion for Order Deeming Matters Admitted.

Plaintiffs' request for sanctions is denied, as the motion was unopposed. Code Civ. Proc. §§ 2030.290(c), 2031.300(c). Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

Motion to be Relieved as Counsel

The motion by Robert P. Dudugjian and Dudugjian & Maxey to be relieved as counsel for defendant Reginald Leipsic is granted, effective upon the filing of the proof of service of the signed order upon Mr. Leipsic and all other parties who have appeared in the action.

8. S-CV-0033005 Royo, Afsaneh vs. Interpose Inc., et al

Defendant Jeld-Wen, Inc.'s Motion for Determination of Good Faith Settlement is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling party's proportionate share of liability for plaintiffs' injuries, and therefore is in good faith within the meaning of Code of Civil Procedure section 877.6.

9. S-CV-0033414 Casper, John P. vs. Mackay, Edward

The Motion to Continue Trial is dropped in light of the ruling consolidating this case with Case No. SCV-31959.

10. S-CV-0033463 House, Stephen Michael, et al vs. Whittle, Joseph, et al

Defendants' Motion to Compel Responses to Requests for Production of Documents is denied. The proof of service attached to the subject discovery (Exhibit 2 to the declaration of Steven Kelly) refers only to Requests for Admission, Set One. No proof of service has been provided to the court showing proper service of the Request for Production of Documents.

11. S-CV-0033945 Tracy, Arthur Joseph vs. Sac. Spine & Physical Therapy

Defendant's Motion to Compel Answers to Form Interrogatories, Special Interrogatories and Request for Production is granted. Plaintiff shall serve verified responses to the subject discovery, without objections, by no later than November 21, 2014.

Defendant's request for sanctions is denied, as the motion was unopposed. Code Civ. Proc. §§ 2030.290(c), 2031.300(c). Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

12. S-CV-0034010 Beadle, Marva vs. Allied Trustee Services, et al.

The Demurrers to First Amended Complaint and Motion to Sever are continued on the court's own motion to November 18, 2014 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry. The court apologizes for any inconvenience to the parties.

13. S-CV-0034081 Leung, Arthur vs. Padilla, Hector, et al

Defendant Interstate Improvement, Inc.'s Motion to Compel Responses to Form Interrogatories, Set One, and Motion to Compel Responses to Request for Documents, Set One, are granted. Plaintiffs shall serve verified responses to the subject discovery, without objections, by no later than November 25, 2014.

Defendant's request for sanctions is denied, as the motion was unopposed. Code Civ. Proc. §§ 2030.290(c), 2031.300(c). Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

14. S-CV-0034359 Gray, Duane Bradley vs. Gray, Donly C., III, et al

Defendants' request for judicial notice is granted.

Defendants' Demurrer to First Amended Complaint is sustained in part with leave to amend, and overruled in part.

The demurrer is overruled with respect to plaintiff's first cause of action to quiet title, as alleged against defendants Donly C. Gray, III and Mary Jane Lynch. For purposes of a cause of action to quiet title, plaintiff must allege (1) a description of the property, including a legal description and street address or common designation; (2) plaintiff's title and the basis upon which it is asserted; (3) the adverse claims against which a determination is sought; (4) the date as of which the determination; and (5) a prayer for determination of the title of plaintiff against adverse claims. Code Civ. Proc. § 761.020. Plaintiff alleges that his title is based upon a fully performed oral contract entered into in 1984. The first amended complaint does not allege the dates upon which adverse claims to the subject property were first asserted. The allegations of the first amended complaint are sufficient to state a claim to quiet title against Donly C. Gray, III and Mary Jane Lynch.

With respect to other named defendants, the demurrer to the first cause of action to quiet title is sustained, as the complaint does not allege adverse claims by these defendants against plaintiff's title to the subject property, and plaintiff apparently concedes that he has no basis to state a claim for quiet title against those defendants.

The demurrer is sustained with respect to plaintiff's second cause of action for adverse possession. The first amended complaint fails to allege that the holder paid all taxes levied and assessed upon the property during the subject period. *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421.

The demurrer is sustained with respect to plaintiff's third cause of action for prescriptive easement. An easement is an incorporeal interest in the land of another that gives the owner of the easement the limited right to use another's property or to prevent the property owner's use of his or her property. Civ. Code § 887.010; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 25. It is a nonpossessory restricted right to a specific use or activity on the land of another that is less than ownership but may be a permanent right. *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306. Plaintiff's first amended complaint does not allege a nonpossessory right, but rather the right to exclusive possession and use of the subject property, and therefore does not appear to properly seek establishment of an easement.

The demurrer is sustained with respect to plaintiff's fourth cause of action for fraud. This cause of action is not stated with requisite specificity. *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184. The first amended complaint does not allege the particular representations, by whom they were made, or when or how they were made.

Finally, the demurrer is sustained with respect to plaintiff's fifth cause of action for civil conspiracy. Additional factual allegations are necessary to establish a predicate tort and a

common plan or design by the defendants in furtherance of commitment of the tort. *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1541; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.

Any amended complaint must be filed and served by no later than November 21, 2014.

Defendants' Motion to Strike Portions of Plaintiffs' First Amended Complaint is granted without leave to amend. Defendants assert that the first amended complaint improperly prays for attorneys' fees absent any proper basis to do so. Plaintiff has not opposed this motion, apparently conceding its merits. Item #3 in the prayer for relief as to each cause of action is hereby stricken.

15. S-CV-0034405 Noziska, Joanne, et al vs. Christensen, Todd, M.D., et al

Defendant Depuy Orthopaedics, Inc.'s Application for Order Admitting Joseph G. Eaton as Counsel *Pro Hac Vice* is granted.

16. S-CV-0034449 S.D. Deacon Corp. of California vs. Rocklin Crossings, LLC

Plaintiff's Motion to Compel is granted.

Defendant Rocklin Crossings, LLC shall serve further responses to plaintiff's Request for Production of Documents, Set One, which remove objections relating to Joe Pontremoli's purported status as a consultant expert witness. Defendant shall serve all responsive documents within its possession, custody or control, as well as an updated privilege log if necessary, by no later than December 4, 2014.

17. S-CV-0034833 Larios, Frank, et al vs. Bank of New York Mellon, et al

Defendants' request for judicial notice is granted.

Defendants The Bank of New York Mellon and National Default Servicing Corporation's ("Defendants'") Demurrer to Complaint is sustained without leave to amend.

The court takes judicial notice of the files and records in Placer County Superior Court Case No. SCV-31267, *Frank Larios, et al. v. The Bank of New York Mellon, et al.* The complaint in the prior action alleged identical causes of action as are alleged in this action, against defendants The Bank of New York Mellon ("BONY"), Bank of America and Recontrust Company, N.A. The complaint in the prior action was dismissed following the court's order sustaining defendants' demurrer to the complaint without leave to amend.

Claim preclusion (traditionally referred to as *res judicata*) precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. *Vezina v. Continental Cas. Co.* (1977) 66 Cal.App.3d 665, 669. *Res judicata* is applicable to the same causes of action between the same parties or their privies. *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340. Claim preclusion prohibits

plaintiffs from relitigating causes of action that were finally determined in the prior action against BONY, which was a named defendant in both actions. Further, substituted trustee NDSC also benefits from the principles of res judicata, as it is in privity with the beneficiary and servicing agent.

In addition, each of plaintiffs causes of action fails to state a valid claim against Defendants. Plaintiffs' first cause of action for wrongful foreclosure fails to state a valid claim. To the extent plaintiffs allege improper securitization of the loan, they lack standing to enforce any agreement relating to transfer of the beneficial interest under the promissory note. *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 515. Nor do plaintiffs allege any prejudice based on the alleged transfers of interest. *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272. The applicable foreclosure statutes do not preclude foreclosure where the foreclosing party does not possess the original promissory note. *Debrunner v. Deutsche Bank Nat'l Trust Co.* (2012) 204 Cal.App.4th 433, 440.

Plaintiff's second cause of action to quiet title also fails to state a valid claim. The complaint does not contain a legal description of the property, and plaintiffs do not state a cognizable legal basis for vesting title in themselves. Code Civ. Proc. § 761.020. Plaintiffs must tender full payment of their debt to bring a claim for quiet title. *Mix v. Sodd* (1981) 126 Cal.App.3d 386, 390; *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388, 391-395.

Finally, plaintiff's third cause of action for declaratory relief fails to state a valid claim. Plaintiffs fail to allege any actual, present controversy between themselves and defendants. Code Civ. Proc. § 1060. To the extent this cause of action is based on allegations of the previous causes of action, it fails because those causes of action fail.

Plaintiffs bear the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiffs that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint does not suggest on its face that it is somehow capable of amendment and as no opposition has been filed, plaintiffs have failed to make any showing that the complaint can be amended to change its legal effect. Accordingly, the demurrer is sustained without leave to amend.

18. S-CV-0035119 Macrae, Nancy vs. Macrae, Donald S.

Defendant's request for judicial notice is granted.

Defendant's Demurrer to Complaint is sustained without leave to amend.

Plaintiff's complaint alleges a single cause of action for fraud. The act constituting fraud is alleged to have taken place in August 1982, when defendant purportedly induced plaintiff to transfer her interest in real property to defendant. However, the complaint fails to allege facts showing that plaintiff was ignorant of relevant facts, or lacked the ability to have discovered

facts within the statutory period. *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 809. Plaintiff alleges only that she did not know of the fraud until “2013 when I talked to an attorney.” This statement is insufficient to adequately allege that plaintiff could not have discovered facts establishing the fraud claim with reasonable diligence prior to this time.

In addition, based on documents of which the court takes judicial notice, the named defendant passed away in September 2014. Accordingly, the complaint currently names an incorrect defendant. Probate Code § 9370(a)(3).

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint does not suggest on its face that it is somehow capable of amendment and as no opposition has been filed, plaintiff has failed to make any showing that the complaint can be amended to change its legal effect. Accordingly, the demurrer is sustained without leave to amend.

19. S-PR-0007399 Blake, Robert - In Re the Estate of

The motion to quash service of summons is continued to November 4, 2014, 1:30 p.m., to be heard on the probate calendar. Probate notes were previously posted for this matter and no further tentative ruling will be issued by the court.

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